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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~833~~ 36

J. E. PIERCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF

L. E. GWINN,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940

No. 833

J. E. FIERCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF

May It Please the Court:

I.

When the petition herein, and brief in support thereof, were filed, petitioner did not have access to the report of the Committee that considered the Act of February 28, 1938, extending the scope of Section 32 of the Criminal Code (U. S. Code, Title 18, Section 76), so that it would include officers or employes of corporations owned or controlled by the United States.

Having subsequently examined the report (No. 1703) of the Judiciary Committee of the House of Representatives

with respect to that amendment, petitioner calls it to the attention of the Court, and particularly the letter of the Acting Attorney General, included in that report, to-wit:

> "Office of the Attorney General,
> Washington, D. C., May 7, 1937.
>
> Hon. William B. Bankhead,
> The Speaker, House of Representatives,
> Washington, D. C.
>
> My Dear Mr. Speaker: The existing law makes it a crime to impersonate any officer or employee of the United States with intent to defraud (Criminal Code, Sec. 32, U. S. Code, Title 18, Sec. 76). It seems desirable to extend the scope of the act so as to penalize impersonation of officers and employees of Government-owned and Government-controlled corporations.
>
> The maximum penalty that may now be imposed for the offense of impersonation is imprisonment for a term of 3 years and a fine of $1,000. In aggravated cases a greater punishment may prove suitable, and I suggest increasing the maximum penalty to imprisonment for 5 years and a fine of $5,000.
>
> A bill to effectuate this purpose is submitted herewith.
>
> Sincerely yours,
>
> Joseph B. Keenan,
> *Acting Attorney General.*"

The bill (S. 2381) as it passed the Senate contained both proposals of the Attorney General, but upon recommendation of the House Judiciary Committee the penalties of existing law were restored. This recommendation was as follows:

> "Your committee concurs in the recommendation of the Attorney General with regard to extension of the statute, but is of the opinion that the existing penalties are sufficient. The committee amendment, therefore, restores the penalties in the bill to those of present law."

The Tennessee Valley Authority Act of 1933 created a *corporation* owned and controlled by the Government (U. S. Code, Title 16, Ch. 12a, Sec. 831) but prior to the amendment of Section 32 by the Act of 1939, the impersonation of officers and employees of a Government-owned or Government-controlled corporation was not an offense under that statute.

The transactions involved in this case were charged to have been committed in 1935.

Government witnesses, testifying to transactions involved in the indictment, did not claim to be able to repeat the exact language used by petitioner with respect to the Government (R. 51, 69, 70, 77, 78, 86, 97, 110, 112, 123).

The basis of the conclusions of these witnesses that petitioner was representing the Government was their construction of statements relating to the T.V.A. and cheaper power which they regarded as government enterprises, and in their testimony they made no distinction between the Government and the T.V.A.

Instances include:

The testimony of Simpson, relating to counts 11 and 12, that petitioner claimed to be "working in the interest of the Government" (R. 73, 78). This witness testified at a preliminary hearing when the matter was fresh in his recollection that petitioner claimed to be "working in the interest of T.V.A." (R. 78, 79, 288); that of Blackman, testifying to the transaction in Counts 14 and 15, that he reached the conclusion that petitioner represented the Government because the letters "TVA" constituted the "big printed top" across the page of one of the newspapers exhibited to the witness (R. 71); that of Robinson, testifying in regard to Counts 18 and 19, that he quoted petitioner as saying that he represented the Government because the latter claimed

to be "selling T.V.A." which the witness considered a "government project" (R. 316, 317).

To detail further testimony, showing that Government witnesses made no distinction between the T.V.A. and the Government, and their conception that the T.V.A. and the Government were identical or that the former was a department of the latter, would serve no useful purpose. It is too clear to admit of reasonable controversy that the conclusion of any of these witnesses, not one of whom claimed to be able to state the exact language used by petitioner, rested largely, if not entirely, upon his belief that there was no difference between a representative of the Government and a representative of the Tennessee Valley Authority.

But that distinction was of vital importance in determining the guilt or innocence of petitioner, and in view of the fact that the bulk of the Government testimony was restricted to purported claims by petitioner that he was connected with, or represented the T.V.A.; the fact that the Government tried the case on the theory that the T.V.A. was a branch or arm of the Government (R. 316), and the further fact that the trial court refused to direct a verdict in favor of petitioner on counts where there was not a scintilla of evidence that petitioner claimed to be connected with, or to represent the Government, or that he even mentioned the Government, unless a claimed connection with, or representation of, the T.V.A. was equivalent to a claim that he was acting under federal authority, it is clear of doubt that the special request, drawing a line between an impersonation of officers or agents of the United States and the impersonation of officers or employees of the Tennessee Valley Authority, if such was made, should have been given.

The general charge did not suggest such a distinction. Therefore to refuse the special request was to license the

jury to convict for an offense that was made such by an *ex post facto* statute.

There is no substantial evidence, as petitioner construes the record, that officers or agents of the Tennessee Valley Authority were impersonated by him, but if so, Section 32 of the Criminal Code, as it existed in 1935, could not be extended by judicial construction to include such an impersonation without violating principles that are fundamental in our system of jurisprudence. *Fasulo* v. *U. S.* 272 U. S. 620.

II.

To divide the cost of a series of page advertisements into units and to solicit funds for the payment therefor on the basis of such units, is a plan that could be submitted to a person of ordinary experience without insulting his intelligence. But to pretend to be selling "TVA units", as charged in the indictment, such units having neither actual nor potential existence, and to make that claim to substantial farmers, merchants and physicians, would be a procedure that is difficult to explain on any theory consistent with common sense on the part of the claimant or ordinary intelligence on the part of the person to whom it was made. Consequently, if such a claim was made to persons of the classes mentioned, we think it would fall within the operation of the rule that there is no false pretense where the representation is "*absurd or irrational or where the party alleged to be defrauded had the means of detection at hand.*" *Wharton on Criminal Law*, 12th Edition, Section 1456, Pages 1742, 1743.

Here the persons alleged to have been defrauded not only had the "means of detection at hand" *but actually had such means in hand*, this being a plain and unambiguous receipt given each subscriber by petitioner, and every per-

son thus furnished a receipt which he could then and there read was fully capable of understanding its meaning.

III.

Petitioner, at page 31 of his brief herein, emphasizes the extent to which the Government testimony consists of hasty impressions and unwarranted conclusions.

A few additional facts and circumstances are hereinafter mentioned that tend to support the contention stated.

Many of the Government witnesses testified that T.V.A. and cheaper power "meant the same thing to them." (R. 78, 47)

The testimony of petitioner's witness Bringle is illuminating as to this confusion or identification of different concepts and its probable consequence as reflected in the evidence. We quote therefrom as follows:

> "Mr. Pierce asked me then if I wasn't an advocate [illegible] roads and TVA or something to that effect, and I told him I was.
>
> "Q. In that connection did you make any inquiry as to what capacity he was there in?
>
> "A. Him and myself discussed different things as to him, and sometime in this conversation I asked him if he was connected with the Government, and he turned and told me. 'Don't get me wrong, Judge, I don't represent the Government in any capacity.'
>
> * * * * * * *
>
> "Q. You say something was said about cheaper power or TVA. Do you remember the exact language on that point?
>
> "A. No, sir, I do not, Mr. Gwinn, because if he said cheaper power, I naturally connected with TVA, and if he had said TVA I would have connected it up with cheaper power." (R. 210)

Further illustrating the conclusions, sometimes absurd, to which a prior concept, a faulty recollection, or careless listening may lead, reference is made to the testimony of the Government witness Luckey that petitioner claimed to have been acquainted with Andrew Johnson (R. 112), the basis thereof being petitioner's statement that Oscar Johnson, one of the nation's leading agriculturists, had subscribed to his program of community advertising (R. 135).

Petitioner became acquainted with President Roosevelt when the latter was Assistant Secretary of the Navy (R. 135, 139). In praising the power objectives of the Roosevelt Administration, petitioner sometimes referred to this acquaintance (R. 240). Petitioner's letter of identification was signed by his son as president of the corporation that published the Huntsville Daily Register (R. 36). Two of the Government witnesses, neither, however, testifying to a transaction involved in the indictment, to whom this letter was read, stated that they thought it was signed by the President of the United States (R. 35, 131). The parts of the letter which these witnesses identified as having been read to them clearly show that there was no ground for such a conclusion (R. 35, 139).

According to one of the Government witnesses when demand was made that petitioner refund the money paid him by another Government witness, he refused on the ground that he had sent the money to "*Washington*" (R. 61). But the witness making the demand testified that petitioner refused on the ground that he has sent the money to "*Alabama*" (R. 65).

There are three questions that have been emphasized in this supplemental brief, to-wit:

(1) The conviction of petitioner without any substantial evidence of the commission by him of a criminal or a wrongful act.

(2) The extension of Section 32 of the Criminal Code as it existed in 1935 to include acts not within its scope but which the court apparently thought should be punished. On this point, as the record shows, the trial judge was of the opinion that the impersonation of officers or employees of the Tennessee Valley Authority was within the scope of the act, and the Government continued to try the case on that theory despite the adverse ruling of the Court of Appeals (R. 316, 317).

(3) Actually, if not theoretically, the conviction of petitioner under an *ex post facto* law.

If the public interest requires that courts in the imposition of punishment keep within the limits of the law, and the protection of the constitutional rights of the citizen is a matter of general importance, then it is respectfully submitted that the petition states a proper case for granting the writ of certiorari.

L. E. Gwinn,
Attorney for Petitioner.